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offence alleged to have been committed by the accused. They are entirely inappropriate to the case of proceedings under section 488, which are more of a civil than a criminal nature, as has been pointed out in *Rozario* v. *Ingles*[1] and *In re Ponnammal.*[2] The obvious reason for the provisions of section 342 is the fact that a person accused of an offence cannot give evidence on oath in support of his own case, whereas a person against whom proceedings are instituted under section 488 is permitted to give evidence on oath on his own behalf, and has a full opportunity of being heard as if he were a party in a civil suit. Therefore I am clearly of opinion that section 342 does not apply to proceedings under section 488. There is a ruling of the Calcutta High Court in *Bachai Kalwar* v. *Jamuna Kalwarin*[3] to the same effect. As there pointed out, section 488 has been amended in 1923, so as to strike out the reference that formerly existed to "the accused"; and this supports the view that I have taken. Therefore, in my opinion, there is no adequate ground for our interfering in revision, and I would dismiss the application.

MIRZA, J. :—I agree.

Application dismissed.

J. G. R.

[1] (1893) 18 Bom. 468 at p. 473. [2] (1892) 16 Mad. 234.
[3] (1924) 25 Cr. L. J. 1091.

APPELLATE CIVIL.

Before Sir Charles Fawcett, Kt., Acting Chief Justice, and Mr. Justice Mirza.

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THE MADRAS AND SOUTHERN MARATHA RAILWAY COMPANY, LTD., APPLICANTS (ORIGINAL DEFENDANTS) *v.* JUMAKHRAM PARBHUDAS GUJRATHI (ORIGINAL PLAINTIFF), OPPONENT.*

Provincial Small Causes Courts Act (IX of 1887), section 25—High Court—Limits of revisional jurisdiction—Will not interfere with fair inferences—

* Civil Revision Application No. 270 of 1927.

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MADRAS AND SOUTHERN MARATHA RAILWAY CO., LTD. v. JUMAKHRAM

Risk-note Form H (amended)—Misconduct of railway servants—Fair inference from facts found—Loss of consignment—Liability of Railway Company.

Certain goods were consigned to the defendant company at Sangli for conveyance to the plaintiff at Poona. The whole consignment was lost in transit. The goods were sent under the amended risk-note in Form H. Plaintiff sued the defendant company in the Court of Small Causes at Poona to recover the value of the lost goods. The Court held that the plaintiff did not prove misconduct on the part of the railway servants but that it could be fairly inferred from the evidence given in the case and decreed the plaintiff's claim. The defendant company applied in revision to the High Court under section 25 of the Provincial Small Causes Courts Act.

Held, (1) that the High Court would not interfere in revision with the finding of a Court of Small Causes unless it be shown that the inference drawn by the Court was not one that could fairly be drawn from the facts :

G. I. P. Railway v. *Himatlal*,[1] referred to;

(2) that if the evidence proved facts *strongly preponderating in favour* of an inference that went against the view that there was misconduct on the part of the railway servants, it would justify interference by the High Court under section 25 of the Act, for this would mean that the inference of such misconduct clearly was not a " fair " one and thus the decision was unjust and not " according to law " :

Smith, Ld. v. *G. W. Ry. Co.*[2] and *Central India Spinning & Weaving Co.* v. *G. I. P. Ry.*,[3] followed;

(3) that under section 25 of the Provincial Small Causes Courts Act the High Court interferes only to remedy substantial injustice, i.e., when a clear error of law is shown or when there is obvious perversity in the decision of a question of fact :

Poona City Municipality v. *Ramji*[4] and *Mohanlal* v. *Jivanlal*,[5] followed;

(4) that it was not a fit case for the High Court to interfere in revision with the finding of the lower Court as there was no clear preponderance of probability shown against the theory of a theft by some railway servant or servants and that the risk-note in question only required such misconduct as could be " fairly inferred " from the evidence.

THIS was a revision application preferred by the defendant company under section 25 of the Provincial Small Causes Courts Act, IX of 1887, against the order passed by R. K. Bal, Small Cause Court Judge, at Poona, in Suit No. 620 of 1926 decreeing the plaintiff's claim for Rs. 180-6-0 with costs.

In February 1925 the plaintiff delivered to the defendant company at Sangli 5 tins of ghee for conveyance to

(1) (1923) 25 Bom. L. R. 350.
(2) [1921] 2 K. B. 237 at p. 243.
(3) (1921) 24 Bom. L. R. 272 at p. 280.
(4) (1895) 21 Bom. 250.
(5) (1927) 29 Bom. L. R. 928.

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Poona. The said goods were consigned under a risk-note in form H (amended) duly signed by the consignor. The risk-note in form H (amended) ran as follows :—

"Whereas all consignments of articles or animals for which the M. S. M. Railway Administration quotes both owner's risk or special reduced rates and railway risk or ordinary rates are (unless I/we shall have entered into a special contract in relation to any particular consignment) despatched by me/us at my/our own risk and are charged for by the M. S. M. Railway Administration at special reduced or owner's risk rates instead of at ordinary tariff or railway risk rates, I/we, the undersigned, in consideration of such consignments being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any of such consignments from any cause whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants; provided that in the following cases :—

(*a*) Non-delivery of the whole of a consignment or of the whole of one or more packages forming part of a consignment packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire,

(*b*) Pilferage from a package or packages forming part of a consignment properly packed as in (*a*), when such pilferage is pointed out to the servants of the Railway Administration on or before delivery,

the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor.

This agreement shall be deemed to be made separately with all Railway Administrations or transport agents or other persons who shall be carriers for any portion of the transit."

The said consignment was lost in transit whereupon the plaintiff filed Suit No. 620 of 1926 in the Court of Small Cause at Poona to recover from the defendant company the sum of Rs. 180-6-0 as the value of the ghee undelivered, together with the costs of the suit. The defendant company contended *inter alia* that the suit consignment was lost in transit on account of a theft in a running train and that there was no misconduct on the part of the railway servants.

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At the trial the plaintiff led no evidence to prove misconduct on the part of the defendant company's servants; the Court however inferred from the evidence in the case that the loss to the plaintiff arose from the misconduct of the servants of the defendant company and decreed the plaintiff's claim with costs. The defendant company applied to the High Court in revision.

B. J. Desai, with Messrs. *Crawford Bayley and Company*, for the applicants.

S. E. Bamji, for the opponent.

FAWCETT, AG. C. J. :—The plaintiff brought this suit against the Madras and Southern Maharatta Railway Company to recover a sum of Rs. 180-6-0 as damages in respect of five tins of ghee which were consigned to the defendant company at Sangli for conveyance to the plaintiff and which were wholly lost during transit. The goods were sent under a risk-note in form (H), which has been amended so that in certain cases it is provided that the Railway Administration " shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor." An issue was raised accordingly whether the plaintiff proves loss arising from misconduct of Railway servants. The First Class Subordinate Judge found that such misconduct was not proved by the plaintiff, but that it could be " fairly inferred " from the evidence given in accordance with the proviso in the risk-note, and he decreed the plaintiff's

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claim. This decree is challenged by a revision application under section 25 of the Small Causes Courts Act, 1887, which enables us to call for the record of the case and satisfy ourselves, whether the decision is one according to law.

The first question that arises is as to the limits of our jurisdiction to interfere in a case like the present. It has been laid down that this Court will ordinarily interfere only to remedy substantial injustice, i.e., when a clear error of law is shown, or there is obvious perversity in the decision of a question of fact: cf. *Poona City Municipality* v. *Ramji*[1] and *Mohanlal* v. *Jivanlal*.[2] Primarily, whether there was such misconduct would be a question of fact. On the other hand, when there is no direct evidence of such misconduct, e.g., of some one who saw a Railway servant taking the tins, so that the conclusion rests purely upon an inference to be drawn from the circumstances under which the goods were consigned, carried and found to have disappeared, then the question of the proper inference to be drawn can be said to be a question of law: cf. *Lachmeswar Singh* v. *Manowar Hossein*[3] and *Ramgopal* v. *Shamskhaton*.[4]

But there are obvious objections to this Court being called upon under section 25 to go into decisions of Small Cause Courts as to what is a fair inference in a particular case under this proviso, as if a right of appeal lay to this Court. We should not, I think, interfere, unless it is shown that the inference is not one that can legitimately (or it is perhaps better to use the exact word of the proviso, viz., " fairly ") be drawn from the facts, as was for instance the case in *G. I. P. Railway* v. *Himatlal*.[5] That case no doubt related to a different

(1) (1895) 21 Bom. 250.
(2) (1927) 29 Bom. L. R. 928.
(3) (1891) 19 Cal. 253 (P. C.)
(4) (1892) 20 Cal. 93 (P. C.)
(5) (1923) 25 Bom. L. R. 350.

form of risk-note from the one under consideration here; but it serves to give a useful illustration of justifiable interference under section 25, in regard to an inference of misconduct of Railway servants that did not fairly arise from the facts found.

Then again, if the evidence proves facts *strongly preponderating in favour of* an inference that goes against the view that there was misconduct on the part of the Railway servants, this might justify interference under section 25, for this would mean that the inference of such misconduct clearly was not a " fair " one, and thus the decision was unjust and not " according to law." I take the words " strongly preponderating in favour of " from a passage in the judgment of Bankes, L. J., in *Smith, Ld.* v. *G. W. Ry. Co.*,[1] which has been cited in *Central India Spinning & Weaving Co.* v. *G. I. P. Ry.*[2]

In the same judgment Bankes, L. J., says (p. 244) :—

" If the facts are such that no reasonable man could draw a particular inference from them, or if the particular inference is such as to be equally consistent with non-liability and with liability, then the party who relies on the inference to discharge the onus of proof of establishing liability fails."

The first hypothesis has been dealt with, and I have given reasons for holding that such a case would justify interference under section 25. But does this apply equally to the second hypothesis, where the inference to be drawn is doubtful? In my opinion, the answer is in the negative. In *Smith, Ld.* v. *G. W. Ry. Co.*,[1] their Lordships were dealing with a risk-note, under which the Railway Company were only liable " upon proof that " the loss " arose from the wilful misconduct of " the Railway servants (see at p. 238 of the report). The quotation from *Pomfret* v. *Lancashire and Yorkshire Railway*[3] therefore applies, viz., " The burden,

[1] [1921] 2 K. B. 237 at p. 243. [2] (1921) 24 Bom. L. R. 272 at p. 280.
[3] [1903] 2 K. B. 718 at p. 721.

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and the whole burden, of proving the conditions essential to the obtaining an award of compensation, rests upon the applicant and upon nobody else, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him." But the risk-note here does not require such misconduct to be "proved" (i.e., with the conclusiveness or preponderance of probability laid down in section 3 of the Indian Evidence Act), but only that such misconduct can be "fairly inferred" from the evidence. This entirely alters the test to be applied, in judging whether interference in revision is justifiable. Even as regards the case of a second appeal from a decree (where interference is justifiable on the ground of a simple error of law), this Court has laid down that "where . . . the legal inference to be deduced from facts is doubtful, it is not open to this Court in second appeal to interfere with the findings of the lower Court," per Farran, C. J., in *Rajaram* v. *Ganesh Hari Karkhanis.*[1]

This is of importance in this case, because I have come to the conclusion that there is no clear preponderance of probability shown against the theory of a theft by some Railway servant or servants, and that the highest at which the case of the applicant can be put is that the probabilities for and against such a theory are about equally balanced. Nor it is a case where it can be said that there is no evidence justifying the inference that is drawn by the Judge.

I do not propose to discuss the evidence in detail. I think that on the evidence, as it stands, the Judge could fairly hold it improbable that the theft was committed by strangers, while the train was at a station,

[1] (1895) 21 Bom. 91 at p. 94.

or by railway thieves while the train was running between Tasgaon and Koregaon, where the theft was discovered, which was the theory put forward for the Railway administration. There is a conflict of testimony whether the wagon, from which the tins disappeared, had a bent bar, or other attachment, by which a thief could get up and open the doors of the wagon, while the train was running. The guard (defendant's 4th witness) no doubt deposes that there was a bent bar by which a man could stand up with the support of the door chain; but on the other hand the number-taker (defendant's 5th witness) says there was no step attached to a wagon with two doors, such as this one was. The plaintiff also deposed that there was no bent iron bar attached to a wagon of that description. It cannot be said to have been clearly proved that a Railway thief could have got on to this wagon while the train was in motion and committed the theft. Nor has reliable evidence been adduced that there had been similar running-train thefts between Tasgaon and Koregaon. The evidence of the guard on this point as to one or two such thefts having been committed is vague and mere hearsay. Nor has it been shown that the trains, owing to a climb, have to slow down between these two stations as to make it possible for persons to board the train easily. Though I do not say that all the facts found go against the theory of a running-train theft, there are, in my opinion, reasonable grounds on which the lower Court could fairly draw the inference it did.

Accordingly, I do not think we should interfere in this case

There are two points, however, which I may refer to, before I close this judgment. The first is that it might be thought that the case of *Central India Spinning &*

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Weaving Co. v. *G. I. P. Ry.*[1] goes against the view I have taken about this Court not going into the absolute correctness of the inference drawn by the Judge in the Court below; but that was a decision in an ordinary second appeal, and Macleod, C. J., was careful to say (p. 281) :—

> "We are not restricted to finding whether there was any evidence which could reasonably if accepted be the basis of the conclusion of the learned Judge in the Court below. It is competent to us to find that on the facts proved the inference drawn was not the right one."

The second point is this. Mr. Bamji for the opponent, in the course of his arguments, supported the lower Court's decision on the further ground that, in any case, the sending of the goods in a wagon sealed merely with paper, seal and wax, amounted to evidence of "misconduct" on the part of the Railway administration, in the meaning of the risk-note. No doubt it has been held by the Allahabad High Court that this constitutes "wilful neglect" under a risk-note in Form B: see *Balram Das, Fakir Chand* v. *The Great Indian Peninsula Railway Company*[2] and *Bindraban* v. *The Great Indian Peninsula Railway Company.*[3] But it may well be doubted, if these decisions are consistent with the Privy Council view in *Ardeshir* v. *G. I. P. Railway*[4] that "wilful neglect" means an act done deliberately, and not by accident or inadvertence. In any case, the expression used in the present risk-note is "misconduct," which does not ordinarily cover acts of negligence: cf. Stroud's Judicial Dictionary, 2nd Edition, Vol. II, p. 1207. Therefore, as at present advised, I agree with the view of the Judge below that such neglect is not covered by the word "misconduct."

I would accordingly dismiss the application with costs.

(1) (1921) 24 Bom. L. R. 272.
(2) (1925) 47 All. 724.
(3) (1926) 48 All. 766.
(4) (1927) 30 Bom. L. R. 275 at p. 281.

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Mirza, J.

MIRZA, J. :—I agree. The trial Court has inferred from the evidence before it that the loss of the respondent's consignment was due to the misconduct of the applicants' servants. The applicants' liability for the total loss of the consignment is governed by the terms of a risk-note in Form H which requires the applicants to disclose to their consignor how the consignment was dealt with throughout the time it was in their possession or control. For this purpose the applicants adduced certain evidence. The respondent gave no evidence of misconduct on the part of the applicants' servants but relied upon the evidence given on behalf of the applicants for a fair inference that there had been such misconduct. Under the terms of the risk-note the consignor is not called upon to prove misconduct unless it cannot fairly be inferred from what the applicants are bound to disclose. The applicants contend that the inference drawn by the lower Court against them is not justified by the evidence.

Under section 25 of the Provincial Small Causes Courts Act (Act IX of 1887) no doubt we have ample discretion to interfere with the orders of the Small Cause Courts, but as was pointed out in *Poona City Municipality* v. *Ramji*[1] it is not the practice of this Court to interfere under section 25 of the Act when there are no substantial merits in the case of the applicant. This Court interferes only to remedy injustice.

Can it be said that the inference drawn by the lower Court from the evidence is perverse or so manifestly unfair that it has resulted in injustice to the applicants? The Court had before it evidence which went to show that the consignment was lost between Tasgaon and Koregaon Railway stations. From a consideration of the probabilities the Court came to the conclusion that

[1] (1895) 21 Bom. 250.

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the loss could not be due to a running theft, or by strangers while the train was at a railway station, but must be attributed to the misconduct of the applicants' servants. From the evidence the Court could legitimately draw such an inference. At any rate, there does not appear to be a preponderating balance of evidence against such inference. In my opinion no error of law leading to injustice is shown which would justify our interference in revision with the judgment of the lower Court. I agree that the application should be dismissed with costs.

Application dismissed.

B. G. R.

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CRIMINAL REFERENCE.

Before Mr. Justice Patkar and Mr. Justice Murphy.

BOMBAY MUNICIPALITY *v.* YENKANNA ELLAPPA*

City of Bombay Municipal Act (Bom. Act III of 1888), sections 402 (2), 403 (1) (a), 471—New private market—Structure designed to be let as small shops—Keeping open a new private market—Landlord—Absence of control over tenants—Fruits, articles of human food.

A landlord erected a structure designed to be let as small shops on the side of the compound of his buildings. The shops were let to tenants on monthly rental basis. The blocks were divided into sixteen shops, each tenant being independent of the other. The customers purchased the goods standing on the pavement of the roads and had no right to enter the shops. One tenant sold flowers, another sold toys and the rest of the tenants sold fruits of various kinds. A Reference being made to the High Court under section 432 of the Criminal Procedure Code, 1898, inviting opinion on the questions—

(1) Whether the shops and the user constituted a private market within the meaning of sections 402 and 403 of the Bombay City Municipal Act, 1888?

(2) Whether the fruits were articles of human food within the meaning of section 402 of the Municipal Act?

(3) Whether the accused had established a new private market or had kept open a private market?

Held, (1) that the structure of the accused was nothing more than a collection of shops and did not constitute a private market;

(2) that the fruits were articles of human food within the scope of section 402 of the Bombay City Municipal Act, 1888;

(3) that the accused was not guilty of establishing or of keeping open a private market.

* Criminal Reference No. 27 of 1928.